United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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P/S

74-1268

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

HAROLD BIGELOW and VIRGINIA BIGELOW and COOPERATIVE FIRE INSURANCE ASSOCIATION OF VERMONT,

Plaintiffs-Appellants,

v.

AGWAY, INC. and KEMIN INDUSTRIES, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT AT CIVIL ACTION NO. 6536.

REPLY BRIEF FOR APPELLANTS

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BATAVIA TIMES, APPELLATE COURT PRINTERS
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BATAVIA, N. Y. 14020
716-343-0457

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The Defendants have raised the defense of assumption of the risk as a ground for sustaining the District Court's granting of a directed verdict although the District Court did not in fact rule on this point (T577).

The Plaintiffs agree with the law cited by the Defendants in their briefs to the effect that the Circuit Court of Appeals may affirm the lower court on any grounds

supported by the record. *Securities and Exchange Commission v. Chenery*, 318 U.S. 80, 88 (1943); *Lum Wan v. Esperdy*, 321 F. 2d 123 (2d Cir. 1963).

The Plaintiffs however vigorously dispute the facts set out in the Defendants' briefs as being the facts of the case and also dispute the application of the doctrine of assumption of the risk as suggested by the Defendants' briefs.

In the case at hand Mr. Bigelow did not know of the risk of fire until after the hay had already been stored, and there is substantial evidence that he did not appreciate the extent of the danger of his barn burning until it caught fire. The facts of Mr. Bigelow's putting hay into other bays in the barn, his only other storage area, and the Defendant Agway's continued use of CO_2 to control the temperature all tend to show that he did not expect there was a high degree of danger of the barn burning.

The evidence did show that he was aware of the dangers to men working in the area (T82) from a possible explosion if the hot spot were exposed to the air (T79):

> Q. After the heating started, after you realized your problem, did a time come back when Mr. Nelson came back to the farm?
> A. Yes.
> Q. Approximately when was that, do you remember?
> A. I don't recall.
> Q. And what transpired, at that time?
> A. We, when he came back to the barn, it was the hottest it ever had been and he decided to go to the fire department and he also told me, "Sorry Harold, there is nothing I can do".
> Q. At that particular time, did he go into the barn?
> A. No, he wouldn't go in.
> Q. And did he indicate to you why he didn't want to go into the barn at that point?
> A. No, he didn't, but I figured I knew why.

Q. When you went down to the fire department, tell me who you saw down there?

A. I saw the Fire Chief.

Q. And were you given some advice concerning your barn that point?

A. Yes, he, at a temperature, he said stay out of there, it could blow any minute. (T78, 79).

* * *

Q. Did a time come when there was some discussion about taking the hay out of the barn?

A. Yes, there was.

Q. Do you remember when the first time that that was discussed?

A. No, I don't recall.

Q. Who is the, what was the discussion, tell us the discussions that you remember and who they were with.

A. With the County Agent and he said it was

Q. Who is the, what was the discussion, tell us the dangerous to go in there.

Q. Anybody else that you discussed it with?

A. Only I think with Agway.

Q. And what was Agway's position as communicated to you to their agent, concerning the taking of the hay out.

A. I don't think they wanted to take it out, because they feared of losing the lives of people in there

Q. Well, let's get back to specifics there, did a time come when arrangements were made by Agway to take the hay out?

A. Yes, there was.

Q. Approximately when was that?

A. It was the eighth.

Q. And what arrangements were made to take the hay out at that time?

A. Well, we had just that time set a date and we was going to take the hay out that day.

Q. Was there any contact with any fire department?

A. I think we had asked them to stand by.

Q. And who was going to actually do the taking of the hay out?

A. Well, I was supposed to help with members of Agway.

Q. And that was to be done on the morning of the 8th.
A. Yes.
Q. And can you tell me what happened that evening of the 7th, early morning of the 8th?
A. That's when the barn burned. (T81, 82 and 83)

Thus there was sufficient evidence to send the case to the jury. As a matter of law it could not be said that the Plaintiff "encountered the risk freely and voluntarily with full knowledge of the nature and extent thereof". *Beck v. Dutton,* 129 Vt. 615, 618 (1971), *Johnson v. Fisher,* 131 Vt. 382 (1973). The Vermont Supreme Court went further in the *Beck* case and cited the Restatement of Torts (Second) Section 496 E;

Necessity of Voluntary Assumption

(1) A plaintiff does not assume a risk of harm unless he voluntarily accepts the risk.

(2) The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to

(a) avert harm to himself or another, or

(b) exercise or protect a right or privilege of which the defendant has no right to deprive him.

The Restatement goes further and in comment c says:

(c) The Plaintiffs' acceptance of the risk is not to be regarded as voluntary where the defendant's tortious conduct has forced upon him a choice of courses of conduct, which leaves him no reasonable alternative to taking his chances. A defendant who, by his own wrong, has compelled the plaintiff to choose between two evils cannot be permitted to say that the plaintiff is barred from recovery because he has made the choice. Therefore, where the defendant is under a duty to the plaintiff, and his breach of duty compels the plaintiff to encounter the

> particular risk in order to avert other harm to himself, his acceptance of the risk is not voluntary, and he is not barred from recovery. The same is true where the plaintiff is forced to make such a choice in order to avert harm to a third person.

Here the Plaintiffs were faced with the dilemma of having to choose between the evils of having to risk lives and property by taking the hay out, or risk the burning of the barn by leaving it in. With the University of Vermont experts and the Agway personnel all working to cool the hay with CO_2 rather than working to remove the hay, certainly the question of the voluntary assumption of the risk by Bigelow should have been submitted to the jury.

It should be pointed out that throughout their briefs on both the issue of proximate cause and the issue of assumption of the risk the Defendants have cited only evidence favorable to them. There was in fact much evidence favorable to the Defendants; as there was much evidence favorable to the Plaintiffs. It is the job of the jury to evaluate this evidence and the case should have been submitted to them. *Galloway v. U.S.*, 319 U.S. 372 (1943). *Simblest v. Maynard*, 427 F2d 1 (2nd Cir. 1970).

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

RE: Harold Bigelow et al
v
Agway, Inc. et al

Docket No. 74-1268

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Louis Cecere being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 15 day of July, 1974 I mailed 2 copies of a printed Reply Brief in the above case, in a sealed, postpaid wrapper, to: each of the following:

Conley & Foote, Esqs.
Drawer 391
Middlebury, Vermont 05753

Miller & Hill, Esqs.
Rutland, Vermont 05701

Ryan, Smith & Carbine, Esqs.
Rutland, Vermont 05701

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Peter F. Langrock, Esq.
15 South Pleasant Street, Drawer 351, Middlebury, Vermont 05753

Louis Cecere

Sworn to before me this

15 day of July, 1974

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 75